Supreme Court, U.S.
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No. 93-1083

In The

Supreme Court of the United States

October Term, 1993

JOHN DOE, individually and on behalf of his minor children,

Petitioner,

v.

PAULA BENNETT and SHERYL GEORGE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

On August 6, 1990, a child abuse investigation was instituted by the Gretna, Louisiana branch of the Office of Community Services ("*OCS*"). Complaint, Paragraph VI, App. 60a.[1] The investigation was begun as a result of an examination by Dr. Richard Bagnetto and subsequent report to OCS of allegations of abuse. Amended Complaint, Paragraph XVIII, App. 67a. Pursuant to LSA-R.S. 14:403, et seq., OCS is required to investigate allegations of child abuse/neglect. Complaint, Paragraph VI, App. 60a.

The subsequent judicial proceedings over the next four months all occurred in the context of a state *civil* divorce/custody proceeding and a state *civil* juvenile proceeding. App. 15a. The results of the OCS investigation were reported to the District Attorney's office on September 14, 1990, and the District Attorney's office filed a child-in-need-of-care petition in civil juvenile court on or about September 25, 1990. The hearing or adjudication in the child-in-need-of-care proceeding was held by the State civil juvenile court judge on December 11, 1990, and the children were found not to be in need of care. Doe himself was never the subject of any criminal prosecution. App. 16a.

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[1] Since the case below was dismissed on defendants' motion to dismiss under Fed.R.Civ.P. 12(b)(6), the only "facts" before the lower courts and now this Court were/are the allegations of the plaintiff in the Complaint and Amended Complaint. Defendants' references in this opposition are to plaintiff's appendices wherein those items and the opinions, judgments, and orders below are reproduced.

This suit (filed on April 5, 1991) was filed after the child-in-need-of-care proceeding was dismissed in December, 1990. The federal claims in this suit were brought under 42 U.S.C. § 1983. Plaintiff John Doe alleged he had a clearly established constitutional right consisting of a "liberty interest" in family integrity and/or in the care, custody and management of his minor children. Plaintiff also alleged garden variety state law tort claims for malicious prosecution.

Defendants raised immunity defenses under the Eleventh Amendment, and under the doctrines of absolute and qualified immunity. On November 12, 1991 three of the defendants were dismissed on the basis of Eleventh Amendment immunity. Plaintiff did not appeal, and that judgment is final.

The child protection caseworker and her supervisor remained as defendants. After plaintiff filed an Amended Complaint, the district court, on January 31, 1992, held that the two remaining defendants were not entitled to either absolute or qualified immunity. App. 37a-48a. The district court indicated that, although the court was aware "of the policy considerations involved in allowing plaintiff[ ] to proceed with those claims against defendants," App. 46a – that of unduly restricting the scope of child abuse investigations – and "the danger that litigation such as this case cause child protection service workers to shift their attention from protecting abused children to avoiding vexatious litigation, thus threatening the health and safety of abused children," App. 47a, nevertheless the defendants' actions as alleged in the Amended Complaint violate plaintiff's clearly established constitutional rights by violating plaintiff's "fundamental

liberty interest in Doe's care, custody, and management of Daughter and Son, as that liberty interest is protected by the Fourteenth Amendment." App. 45a.

On appeal to the Fifth Circuit, the issue actually briefed by both sides revolved around whether the district court had correctly found that there is a clearly established constitutional right of a parent in the "care, custody, and management" of his/her minor children. Defendants cited to the Fifth Circuit the recent decision of the First Circuit in *Frazier v. Bailey*, 957 F.2d 920 (1st Cir. 1992), a case which defendants believe is on all fours with their contention that there was/is no constitutionally protected "liberty interest" or other clearly established constitutional interest in the care, custody, and management of minor children. In their brief to the Fifth Circuit, plaintiff continued to argue that the constitutional right involved was a "liberty interest" in the care, custody, and management of Doe's children, a right plaintiffs contended is protected by the Fourteenth Amendment.

On October 5, 1992, the Fifth Circuit rendered its initial decision in this case. In that decision, the panel chose not to address whether a parent has a clearly established constitutional right in the care, custody, and management of his/her minor children. Instead, the panel decided that there was a clearly established constitutional right to be free from malicious prosecution: "John Doe's complaint does at least allege the violation of *one* clearly recognized constitutional right – the right to be free from bad faith and malicious prosecution." (emphasis added) App. 34a.

Under the initial Fifth Circuit decision, a claim of "malicious prosecution" standing alone would be sufficient to state a claim for a violation of a constitutional right under 42 U.S.C. § 1983. Moreover, since the alleged wrongful conduct all occurred in a *civil* context, the clear import of the Fifth Circuit's decision was that section 1983 actions could be brought based solely upon a claim of "malicious prosecution" which had occurred in an underlying *civil* proceeding. That issue had never even been briefed by the parties. And insofar as defendants were able to determine, prior to that decision no Circuit had extended/expanded section 1983 that far.

Defendants petitioned for rehearing and for rehearing en banc on the issue of whether malicious prosecution in an underlying *civil* proceeding by itself could form the basis for a constitutional tort under 42 U.S.C. § 1983. The Fifth Circuit granted defendants' petition for rehearing, vacated its initial decision, assigned a *new* panel to hear the case, and set the case down for oral argument. Oral argument was then held on March 2, 1993 before the new panel. At oral argument, the panel specifically requested that the parties address the case of *Albright v. Oliver*, 975 F.2d 343 (7th Cir. 1992), *cert. granted* ___ U.S. ___, 113 S.Ct. 1382, 122 L.Ed.2d 757 (1993). The Seventh Circuit had held that malicious prosecution alone could not provide the basis for a constitutional tort under 42 U.S.C § 1983. Unlike the instant case, the underlying proceeding in the *Albright* case arose in a *criminal* context.

On October 4, 1993, the new Fifth Circuit panel rendered its decision in this case. App. 1a-28a. The panel held there is no clearly established constitutional right of family integrity of which defendants would have known:

> Given the absence of more fact-specific law, and in light of *Hodorowski*, *Santosky* – both procedural due process cases – and *Frazier*, *we cannot conclude that the preexisting law establishes that George and Bennett should have known that their conduct violated the nebulous right of family integrity*. Therefore, as a matter of law, George and Bennett did not violate a constitutional right that was clearly established at the time of the alleged conduct.

(emphasis added) App. 13a-14a.

Likewise, the panel rejected the notion that there is a clearly established constitutional right to be free from malicious prosecution in a *civil* proceeding:

> We find no authority for and decline to hold that the mere possibility of criminal prosecution converts an otherwise civil proceeding into the equivalent of a criminal proceeding for purposes of determining whether a constitutional right was violated. . . . *Thus we must now determining whether and when a claim of malicious prosecution is actionable under § 1983 where the underlying proceeding was civil.*
>
> It is unclear when the tort of malicious prosecution states a claim for denial of civil rights under § 1983 where the malicious prosecution occurred in a civil proceeding.
>
> * * *
>
> [I]t can hardly be said that in light of the law in 1990 that the unlawfulness of George's and Bennett's conduct was apparent. Consequently, *'there was no clearly established constitutional*

> *counterpart to an action for malicious prosecution.'* (citation omitted).

(emphasis added) App. 16a-19a.

In her concurring opinion, Judge King stated:

> Specifically, I would hold that Bennett and George are entitled to qualified immunity because Doe has not asserted the violation of a constitutional right at all.

App. 21a.

The panel dismissed the federal claims, holding that defendants were entitled to *qualified immunity*. App. 20a.

SUMMARY OF ARGUMENT

Plaintiff offers three reasons why a writ should be granted. The first reason offered by plaintiff, his claim that there is a "clearly established" constitutional right to family integrity, is the only one which merits even passing consideration. The two Circuits to address this precise issue recently, the Fifth Circuit in this case and the First Circuit in *Frazier v. Bailey* in 1992, have rejected the argument that there is a constitutional right to family integrity because "an interest in family integrity 'must always be balanced against the governmental interest [in the health, education, and welfare of children as future citizens],' " which makes it "difficult, if not impossible, for officials to know when they have violated 'clearly established' law." This rationale, clearly expressed in the First Circuit's *Frazier* decision and adopted by the Fifth Circuit below, makes sense and this Court should not reconsider the

issue. Plaintiff also argues that a writ should be granted to determine whether malicious prosecution standing alone can form the basis for a constitutional tort under 42 U.S.C. § 1983. However, this Court has just rejected this argument in its decision in *Albright v. Oliver* on January 24, 1994. Finally, plaintiff argues that there is a split among the Circuits as to whether child protection case-workers are entitled to absolute immunity or the lesser protection of qualified immunity, and contends that is a reason for granting a writ in this case. However, since the Fifth Circuit is among the Circuits which apply the lesser protection of qualified immunity and since qualified immunity was actually applied in this case, resolution of the Circuit split could not possibly change the result below.

ARGUMENT

Plaintiff sets forth three reasons for granting a writ in this case. *See* Petition for Writ of Certiorari, at 22-28 (hereinafter "Writ").

Two of plaintiff's three reasons should be rejected out of hand. First, plaintiff argues for the granting of a writ on the basis that malicious prosecution standing alone should be enough to form the basis for a constitutional tort claim under 42 U.S.C. § 1983, and also argues that *Albright v. Oliver*, No. 92-833, pending before this Court might require reversal of the Fifth Circuit's rejection of *civil* malicious prosecution as a sole basis for a constitutional tort claim under 42 U.S.C. Section 1983. *See* Writ, at 24. However, this Court just handed down its decision in

Albright last week. *Albright v. Oliver,* 62 U.S.L.W. 4078 (U.S. Jan. 24, 1994). The Court affirmed the Seventh Circuit's rejection of malicious prosecution as a sole basis for a section 1983 action, and concluded that there must be some other constitutional underpinning, such as the Fourth Amendment, for the section 1983 action. In footnote 5 of the plurality opinion, this Court stated: "In view of our disposition of this case, it is evident that *substantive due process may not furnish the constitutional peg* on which to hang such a 'tort'." (emphasis added) *Id.* at 4079 n.5. Thus, *Albright* requires denial of plaintiff's writ application since plaintiff's claim of malicious prosecution in an underlying civil proceeding does not have any separate constitutional underpinning.

Second, plaintiff argues for the granting of a writ on the basis that a conflict exists among the Circuits as to whether child protection caseworkers such as defendants are protected by absolute or only qualified immunity. *See* Writ, at 25-28. There is no reason to address any such Circuit split in this case since the Fifth Circuit is among the Circuits which only afford qualified immunity to child-protection caseworkers and qualified immunity is all that was afforded to defendants in this case. (App. 20a). Therefore, resolution of the Circuit split could not possibly change the result below.

The only reason advanced by plaintiff for the granting of a writ which merits even passing consideration should likewise be rejected. Plaintiff argues that a "clearly established" liberty interest in family integrity and/or in the care, management and control of Doe's minor children existed at the time of defendants' alleged

wrongful conduct. The two Circuits to address this precise issue recently, the Fifth Circuit below and the First Circuit in *Frazier v. Bailey*, 957 F.2d 920, 929-31 (1st Cir. 1992), have held that no such "clearly established" constitutional right exists. The Fifth Circuit in its opinion below, App. 10a-14a, essentially adopted the rationale expressed by the First Circuit in *Frazier* that no clearly established constitutional right to family integrity can exist because "an interest in family integrity 'must always be balanced against the governmental interest [in the health, education, and welfare of children as future citizens],' " which makes it "difficult, if not impossible, for officials to know when they have violated 'clearly established' law." App. 13a. This rationale makes sense and this Court should not reconsider the issue.

CONCLUSION

Considering the decision of the Fifth Circuit on October 4, 1993, the record in this case, and the applicable law, defendants respectfully submit that the Fifth Circuit's dismissal of plaintiff's claims under 42 U.S.C. § 1983 was correct, and therefore the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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